Taxation—Constitutionality of Tax-Refund Statute

F. R. T.
West Virginia University College of Law

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bility that such city would have the status of a de facto corporation], (2) under existing statutes there is no method by which a community with a population in excess of two thousand can be incorporated as a unit, (3) assuming the legislature will be able to draft statutes acceptable to the court's construction of the Home Rule Amendment, the complex issues which probably must be decided by the voters of the proposed municipality will make incorporation extremely difficult.

J. S. W., Jr.

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**Taxation—Constitutionality of Tax-Refund Statute.**—P sued the state tax commissioner to recover an overpayment of business and occupation taxes as had been authorized by *W. Va. Code* c. 11, art. 13, § 8 (Michie, 1949). The circuit court sustained the state's demurrer to the notice of motion for judgment, and on its own motion certified the ruling to the Supreme Court of Appeals. Held, that the legislature exceeded its constitutional powers and to the extent that the statute undertakes to authorize such action or suit, it is invalid as violative of *W. Va. Const. Art. VI, § 35*. Ruling affirmed. *Hamill v. Koontz*, 59 S.E.2d 879 (W. Va. 1950).

A case with similar facts which reached the same result was *Raible Co. v. State Tax Comm'r*, 239 Ala. 41, 194 So. 560 (1940).

It is a well recognized principle of law that a sovereign independent state is not subject to suit except by its own consent. *Cohen v. Virginia*, 6 Wheat. 264 (U.S. 1821). The consent of the state could not be given by the West Virginia statute because it was beyond the power of the legislature to authorize such suits in view of the constitutional provision which reads: "The state of West Virginia shall never be made defendant in any court of law or equity, except... [certain officers thereof] may be made defendant in any garnishment or attachment proceeding. ..." *W. Va. Const. Art. VI, § 35.* The constitutional immunity from suit has been held to cover boards and commissions, created by the legislature, as agencies of the state. *Mahone v. State Road Comm'n*, 99 W. Va. 397, 129 S.E. 320 (1925); *Watts v. State Road Comm'n*, 117 W. Va. 398, 185 S.E. 520 (1936). An agent of the state is protected from suit by the constitutional prohibition of actions against the state, though the state is not in name a party, where the interests of the state are directly
involved. *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S.E. 1007 (1899); see 76 Am. Jur. 92. Although the statute in issue in the principal case authorized a suit against the state tax commissioner, it was within the constitutional ban on suits against the state because the state's interests were involved in that the money for a refund must come from the state's treasury.

The holding of the court, as to the constitutionality of that part of the statute which authorizes suits to recover overpayments of business and occupation taxes, is in line with former decisions of the Supreme Court of Appeals. Conceding that it is a sound decision as to the questions of law involved, it seems that the policy therein is subject to attack. The corporation or business which pays the taxes assessed against it and finds that it has made an overpayment is almost without recourse as a result of the principal case. The taxpayer has the doubtful value of W. Va. Code c. 11, art. 13, § 6 (Michie, 1949). The statute permits the tax commissioner to make a voluntary refund of excessive tax payments; but the taxpayer has no recourse if the tax commissioner does not make such a refund. However, it does permit the taxpayer to apply an overpayment credit to taxes which subsequently accrue. The credit can be established by making use of W. Va. Code c. 11, art. 13, § 8 (Michie, 1949) which permits the taxpayer to have taxes he has paid, as well as assessments prior to payment, reviewed by the board of public works. Allowing the credit to be established and applied to subsequent taxes makes the result of the principal case a little less inequitable.

The majority of the states have placed upon their legislatures the duty of determining when the state will be liable to suit. There are only a few states which retain their absolute immunity from suit, e.g., Alabama, Arkansas and West Virginia. It is difficult to see any great danger in permitting suits to recover excessive taxes because the state would only be returning what it was not entitled to; moreover, it seems extremely inequitable not to provide a means of recovering excessive payments.

There are two possible means of permitting recoveries of overpayments by suits against the state. It could be done by amending W. Va. Const. Art. VI, § 35, to permit suits to recover excessive tax payments; or it could be accomplished by amending the constitution to permit the legislature to authorize suits and make the state liable when it should see fit to do so. See Fla. Const. Art. III, § 22; Ky. Const. § 231; N. D. Const. Art. I, § 22; Wis. Const. Art. IV, § 27.
Another suggested method of accomplishing a refund of taxes is by a statute which would require the tax commissioner to hold tax payments for thirty days in order that an overpayment might be recovered by suit. The theory of this means of recovery is that since the taxes are not yet within the treasury of the state, the state would not be an interested party and the tax commissioner would not be protected by the state's immunity from suit. See Sclove, *Refunds and Recovery of State Taxes Erroneously, Illegally, or Unconstitutionally Imposed in West Virginia*, 41 W. Va. L.Q. 348, 383 (1935). However, this means of recovery has several serious defects. It places a thirty-day statute of limitations upon actions for tax recoveries. It would also place a burden upon the state if the tax funds were needed immediately, because it would delay expenditures of the funds during the period.

F. R. T.

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**Water and Water Courses—Riparian Rights—Extent of Owner's Title.**—The plaintiff, owner of two islands situated in the Ohio River, sued for an injunction against the defendant, a sand and gravel corporation, charging it had wrongfully entered upon the two islands with its dredges and had engaged in taking sand and gravel from the submerged bars surrounding and belonging to the islands. The lower court discharged the temporary injunction it had previously awarded, and plaintiff appealed. Defendant admitted plaintiff's title to the sand and gravel rights within the low-water line surrounding the islands, but denied plaintiff's contention that such line extended to the furthest point to which the Ohio River had ever receded. *Held,* that low-water mark, as related to the Ohio River, is that point to which the water recedes at its lowest stage. Injunction reinstated. *Carpenter v. Ohio River Sand & Gravel Corp.,* 60 S.E.2d 212 (W. Va. 1950).

In laying down this rule the court seems to have made a unique decision. There is a split of authority as to whether the title of a riparian owner extends to high-water mark, *McCauley v. Salmon,* 234 Iowa 1020, 14 N.W.2d 715 (1944); or to the low-water mark, *Philadelphia v. Pennsylvania Sugar Co.,* 348 Pa. 599, 36 A.2d 653 (1944); and some cases hold to the thread of the stream even on a navigable river, *Ulbright v. Baslington,* 20 Idaho 539, 119 Pac.